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84-1254

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOCAL UNION NO. 2812,
LUMBER, PRODUCTION AND INDUSTRIAL WORKERS,

Petitioner,

v.

MISSOULA WHITE PINE SASH COMPANY,
a Montana corporation,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Bernard Jolles *
Harlan Bernstein
Michael T. Garone
Jolles, Sokol & Bernstein, P.C.
721 SW. Oak Street
Portland, OR 97205
(503) 228-6474
*Counsel of Record

QUESTION PRESENTED

May an employer discharge non probationary employees, rather than permit them to return to work at a later date, when the stipulated facts reveal: (1) That these employees were not guilty of any wrongdoing; (2) that due to a lack of work, these employees had been placed on layoff status prior to their discharge; and (3) that the collective bargaining agreement between the employer and the union provides that employees laid off due to slackness of work will have enforceable recall rights?

PARTIES

The caption of the case in this Court contains the names of all parties.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as Local Union No. 2812, Lumber, Production and Industrial Workers v. Missoula White Pine Sash Company, 734 F2d 1384 (9th Cir. 1984). It is reprinted in the appendix at A-1 through A-16, followed by the court's order denying rehearing at A-17 through A-18. The prior unreported decision and judgment of the United States District Court for the District of Montana were rendered and filed April 11, 1983, and are reprinted in the appendix at A-19 through A-28.

BASIS FOR INVOKING JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its opinion and entered it of record on June 12, 1984. Petitioner herein filed a petition

for rehearing and suggestion for rehearing en banc with the United States Court of Appeals for the Ninth Circuit. Said petition was denied by the United States Court of Appeals for the Ninth Circuit on November 9, 1984. (A-17 through A-18) This petition for certiorari is timely, because it is filed within 90 days of that decision. 28 USC § 2101(c); Rule 20, U. S. Supreme Court Rules.

This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit (A-1 through A-16) on writ of certiorari, pursuant to 28 USC § 1254(1).

STATUTES INVOLVED

This case involves a breach of contract action brought by petitioner, pursuant to § 301 of the Labor-Management Relations Act, 29 USC § 185(a), which

states that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce *** may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction

This is an action brought by a labor organization against an employer for breach of a labor contract. The jurisdiction of the United States District Court for the District of Montana was invoked pursuant to 29 USC § 185(a), and by 28 USC § 1337.

2. Facts and Procedural History

Petitioner (hereafter the union) is the exclusive bargaining agent for all employees of respondent (hereafter the

employer). The employer is a Washington corporation, licensed to do business in the State of Montana. It operates a sawmill and remanufacturing plant in Missoula, Montana. At all times material hereto, the union and the employer have been parties to a collective bargaining agreement, which was entered into on September 23, 1980, and which remained in full force and effect through September 1, 1983. Article XIV of the agreement, entitled "Seniority," states, in pertinent part, that,

> In case of lay-off because of slackness of work, employees hired last shall be laid off first and the reverse shall apply when being put back to work, those laid off first shall be rehired last. All employees shall have the right to work in the order of their seniority provided they are competent. Any employee who is laid off shall be returned to work at his regular status when operations are resumed.

Article VIII, "Hire and Discharge," of the agreement states, in pertinent part, that,

> The Company shall have the sole and exclusive right to hire, discipline and discharge any employee. In the event that an employee shall be suspended or discharged from his employment, and he believes he has been unjustly dealt with, such suspension or discharge shall remain effective, but shall constitute a case to be handled under the methods of adjusting grievances under Article V, Handling Complaints.

On or about June 30, 1981, the employer terminated the employment of its fourteen (14) least senior employees. Prior to this time, it had placed a large number of employees (including these fourteen) on layoff, due to a decrease in the demand for lumber products. All fourteen employees were non probationary and had accrued seniority rights under the collective bargaining agreement, and would have

been subject to recall by the employer under the previously quoted language of Article XIV, entitled "Seniority." However, the employer's general manager, upon notifying the employees of their discharges, stated that it was his belief, due to economic circumstances, that there was no prospect of future employment with the company. He explained that there was no prospect that they would return to work in the "reasonably foreseeable future," that being about eighteen (18) months or more from June 30, 1981. In the same letter, however, the employer's general manager stated that, should the employees wish to be considered for employment when the employer was once again "in a hiring position," the employer's personnel office should be contacted.

The union, on February 26, 1982,

brought suit against the employer in the United States District Court for the District of Montana (Missoula Division). The employer appeared, and a trial on stipulated facts was conducted. The District Court entered judgment in favor of the employer (A-28), and ruled that, although the discharge of the fourteen (14) employees was not disciplinary in nature, it was not prohibited by the labor agreement.

The union appealed to the United States Court of Appeals for the Ninth Circuit. That court affirmed the District Court (A-1 through A-13) on essentially the same grounds. A dissenting opinion was filed by Circuit Judge Fletcher, who stated that the majority's opinion ignored the employees' contractual recall rights, and eliminated

significant rights upon which the parties had agreed (A-13 through A-16). The Ninth Circuit denied the union's petition for rehearing and suggestion for rehearing en banc on November 9, 1984 (A-17 through A-18).

ARGUMENT

1. Introduction

The United States Court of Appeals for the Ninth Circuit held that the employer had the unrestricted right to discharge employees, not for some blameworthy conduct on their part, but merely due to lack of work. In so doing, the court misapprehended the common sense distinction between discharge and layoff, and, in essence, read out of the collective bargaining agreement those provisions which give employees the right to be recalled from layoff in the order of their

seniority. The effect of its decision (A-1 through A-13) is to undermine a bona fide seniority system by eliminating significant contractual rights.

2. Reasons for Granting Certiorari

The issues posed by the instant case are of wide import, as many labor agreements contain clauses which grant employees rights of recall from layoff status, and which also contain language reserving to management the right to discharge employees. To allow employers the power to discharge employees when these employees have done nothing wrong, and to allow them to eliminate the seniority rights of employees merely because of lack of work, substantially upsets the careful balance of interests embodied in these collective bargaining agreements.

Only by carefully analyzing the distinction between discharge and layoff can these competing interests be reconciled. The United States Court of Appeals for the Ninth Circuit, however, misapprehended this distinction, and ignored relevant precedent of the United States Supreme Court in reaching its decision. In Fishgold v. Sullivan Drydock & Repair Corporation, 328 US 275, 66 S Ct 1105, 90 L.Ed. 1240 (1946), this Court specifically distinguished the two concepts of discharge and layoff. In Fishgold, an employee was re-employed by his employer after his release from military service. As work decreased, he was laid off by his employer, pursuant to a bona fide contractual seniority system. Because the Selective Training and Service Act of (September 16) 1940, 54 Stat 885, c 720, 50 USC Appx § 301,

11 FCA Title 50, Appx 5, § 1 (expired March 31, 1947), guaranteed that he could not be discharged without cause for one year after his return to work, he brought a civil action contending that his layoff was wrongful and was tantamount to discharge. The United States Supreme Court disagreed, and ruled that an employee laid off by the operation of a seniority system because of a slackening of work cannot be considered to be discharged, as the employee has a continuing relationship with his employer. Id. at 286-287.

The ruling in Fishgold, supra, is directly applicable to the instant case, where the undisputed facts establish that the employer purported to "discharge" employees merely for lack of work, despite contractual provisions affording said employees enforceable recall rights. Despite the obvious similarities between

the two cases, the majority opinion of the United States Court of Appeals for the Ninth Circuit (A-1 through A-13) completely ignores the ruling in Fishgold, and instead equates discharge of an employee with layoff of an employee for lack of work. The majority opinion similarly ignores the great weight of arbitral and other authority, which holds that "discharge" applies only to those situations in which the employer has the right to dismiss for misconduct or dereliction of duty, while "layoff" applies only when there is a lack of work. See, e.g., Adams v. Jersey Central Power and Light, 36 NJ Super. 53, 114 A2d 776, 36 LRRM 2396 (1955); American Republics Corp., 18 LA 248 (Hale 1952). The Ninth Circuit's deviation from accepted principles of labor law, as articulated by this Court,

as well as by other courts and arbitrators, makes this an appropriate case for granting certiorari.

In addition, the United States Court of Appeals for the Ninth Circuit does not afford any weight to the importance of contractual seniority rights, and hence is clearly at odds with this Court's most recent pronouncement on this issue. In Firefighters Local Union No. 1784 v. Carl W. Stotts, etc., et al, ____ US ____, 104 S Ct 2576, 81 L.Ed.2d 483 (1984), the Court ruled that the lower court had erred in enjoining the layoff of black fire fighters, pursuant to a bona fide seniority system, when this would have resulted in other employees with greater seniority being laid off instead. In so ruling, the Court re-emphasized the importance of seniority rights in the industrial world. The Court stated:

> Seniority has traditionally been, and continues to be, a matter of great concern to American workers. '[M]ore than any other provision of the collective [bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms.'
> Id. at 2583, fn 4

The Court ruled that the lower court's actions in enjoining the layoff of black fire fighters upset the legitimate expectations of other innocent employees, who should be able to rely upon the terms of their contract. Id. at 2586.

This Court's decision in Stotts, supra, provides substantial grounds for the granting of certiorari. The United States Court of Appeals for the Ninth Circuit does not address the importance of seniority rights, despite this Court's statements to the contrary; and its ruling, in essence, eliminates such bargained for rights. The discharged employees in the

instant case have seen their hard earned seniority rights trampled on merely because of lack of work, and not due to any blameworthy conduct on their behalf. Should the employer's workload increase, and should additional employees be needed, these employees have no guarantee that they will be rehired by the employer. They have no guarantee that they will not be bypassed in favor of younger job applicants with no prior history with the employer. In addition, if they are rehired by the employer, they would return to work with no seniority, with the obvious detrimental effect on job security. Principles of fundamental fairness addressed by this Court in Stotts, supra, mandate against such a harsh result, which is not in accord with the parties' agreement.

The dissenting opinion by Circuit Judge

Fletcher of the Ninth Circuit clearly recognizes the important principles of job security, overlooked by the majority, and apprehends fully the distinction between layoff and discharge in the industrial setting. (A-13 through A-16)

For all of the above reasons, petitioner submits that this is an important and appropriate case for review; and the petitioner respectfully urges this Court to grant certiorari to decide the questions which have been raised by the decision of the Ninth Circuit.

3. The parties' agreement specifically addresses the issue posed by the instant case.

The majority opinion of the Ninth Circuit (A-1 through A-13) not only misapprehends the distinction between discharge and layoff, and the importance of

seniority rights, as discussed above, but it also misconstrues the collective bargaining agreement between the parties. The majority opinion completely ignores the fact that the parties have bargained for specific and unambiguous contract language, Article XIV C, which sets forth their rights and obligations in situations such as the one present in the instant case. Article XIV C specifically deals with "slackness of work," and it specifically affords employees enforceable recall rights when layoffs occur because of this condition. It is thus clear that the parties have, in the give and take of contract negotiations, agreed to a balancing of rights. Although management is vested with the decision as to whether or not to lay off, laid off employees are afforded certain rights, e.g., the right both to be laid off and recalled from layoff

according to their seniority. The employer is afforded the protection of having an experienced work force ready to return to work at the earliest opportunity, while the employees are given assurances that seniority will govern recall and that new hires will not displace them. The Ninth Circuit's opinion upsets this careful balance of competing interests, which the parties have clearly agreed to, by confusing the concept of discharge with that of layoff.

The majority opinion ignores the specific contractual language of Article XIV, and turns to the general language of Article VIII of the agreement, which gives the employer the right to "hire, discipline and discharge" any employee, to uphold the discharges in the instant case. This constituted error on several grounds: First, it is an axiom of contract

law that specific language in an agreement should override general language. See, e.g., Corso v. Creighton University, 731 F2d 529, 533 (8th Cir. 1984). Being confronted with specific language establishing rights of recall from layoffs due to "slackening of work," the Ninth Circuit need have looked no further, as Article VIII is a mere general recital of the employer's power to discipline employees for wrongdoing up to and including discharge. The Ninth Circuit therefore did not need to even reach the issue of whether the employer would be required to demonstrate just cause for disciplining an employee.

Even assuming, in arguendo, that employees could properly be discharged merely for lack of work, the union should still prevail, as the agreement contains an implied "just cause" limitation upon the employer's power to discharge, or

otherwise discipline, employees. In Local 2750, Lumber and Sawmill Workers v. Rosboro Lumber Co., 97 LRRM 2933 (D. Or. 1978), rev'd in part, 663 F2d 983 (9th Cir. 1981), the district court ruled that the standard of review of discharge cases under contract language very similar to the language present in the labor agreement in the instant case was just or good cause. In Local 2750, as in the instant case, the collective bargaining agreement allowed for an employee to file a grievance alleging unjust discharge, and it allowed for said grievance to be processed through the contractual grievance procedure. Both contracts offered management the right to hire and discharge employees, and neither made provision for binding arbitration should the parties be unable to agree upon a settlement during the grievance procedure. The only relevant

difference in language is that, in Local 2750, the agreement stated that reinstatement would be proper "if it is found that such employee was unjustly suspended." Id. at 2937. In the instant case, reinstatement would be proper if the parties "agreed" that the discharge was unjust. This difference in semantics was seized upon by the Ninth Circuit to distinguish Local 2750, supra. However, the majority does not offer a reasonable explanation as to why the difference in language used is meaningful, or why different legal conclusions would be drawn therefrom. In actuality, Local 2750, supra, provides strong support for the proposition that the employer, under the instant collective bargaining agreement, can discharge only for just cause. It makes little sense to rule, as the Ninth Circuit did, that just cause would be the standard applied during

the grievance procedure, but that a court faced with a breach of contract action cannot apply that standard in evaluating the propriety of the discharge.

The union's position in the instant case is thus twofold. It is the primary position that an employee cannot be "discharged" for lack of work within the generally accepted meaning of the term "discharge," and that what the employer did in the instant case, was, in essence, to layoff the affected employees. Under these circumstances, the explicit and specific contract language governing recall from layoff is clearly applicable. The union's secondary position is that, even if the Court should somehow rule that an employee can suffer the discipline of discharge, industrial "capital punishment," merely because there is a lack of work caused by no fault of his own, the

agreement in the instant case still provides that there must be "just cause" for the discipline imposed. As there can be no "just cause" where an employee has been discharged through no fault of his own, the Ninth Circuit erred in upholding the employer's actions in discharging the employees.

CONCLUSION

This Court should issue its writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and should reverse that court's decision.

Respectfully submitted,

Bernard Jolles *
Harlan Bernstein
Michael T. Garone

Jolles, Sokol & Bernstein, P.C.
721 Southwest Oak Street
Portland, OR 97205
Telephone: (503) 228-6474

February 4, 1985

*Counsel of Record

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION NO. 2812, LUMBER PRODUCTION AND INDUSTRIAL WORKERS,

Plaintiff-Appellant,

v.

MISSOULA WHITE PINE SASH COMPANY, a Montana corporation,

Defendant-Appellee.

No. 83-3776

D.C. No. CV 82-0016 RES

OPINION

[June 12, 1984]

Appeal from the United States District Court for the District of Montana
The Honorable Russell E. Smith, Presiding
Argued and submitted December 7, 1983

Before: ANDERSON, FLETCHER, and FARRIS, Circuit Judges.

J. BLAINE ANDERSON, Circuit Judge:

Missoula White Pine Sash Co. (White Pine) discharged its fourteen most junior employees out of the 94 it had laid off, stating, "[W]e can see no reasonable

expectations of being able to recall all our employees who are currently laid off due to the depressed economy." Local Union No. 2812, Lumber, Production and Industrial Workers (Union) appeals the district court's judgment that the terminations were not a breach of the collective bargaining agreement between it and White Pine. We affirm, holding that the terminations were not a breach of the express provisions of the agreement nor did the agreement contain an implied covenant that White Pine could discharge its employees only for just cause.

No Breach of Express Covenant

The existence of an employee's seniority rights or any limitation of an employer's right to discharge must find its source in the collective bargaining agreement. Broniman v. Great Atlantic and

Pacific Tea Company, 353 F.2d 559, 561 (6th Cir. 1965), cert. denied, 384 U.S. 907 (1966). The agreement between White Pine and the Union contains a "Hire and Discharge" provision:

> The Company shall have the sole and exclusive right to hire, discipline and discharge any employee. In the event that an employee shall be suspended or discharged from his employment, and he believes he has been unjustly dealt with, such suspension or discharge shall remain effective, but shall constitute a case to be handled under methods of adjusting grievances under Article V, Handling Complaints. Such grievances shall be taken up with the company within three (3) working days from the date the employee is informed of a suspension or discharge, or shall be considered waived. If, upon investigation and consideration, the Shop Committee and Company agree that an employee was unjustly discharged and should be reinstated, such reinstatement shall be in accordance with the terms of settlement arrived at between the Company and Shop Committee. In case an employee is discharged, the Company agrees to notify the employee

> and the Shop Committee immediately, giving the reason(s) for discharge.

We agree with the district court that this provision carefully protects White Pine's common law unrestricted right to discharge. If the employee believes that his discharge was unjust, the agreement provides for a grievance procedure by which he may air his complaint to the shop committee and the management. If, however, the management does not agree, the employee will not be reinstated. This comports with the "General Purpose" provision which requires only that the parties consider all questions "fairly, impartially and justly," not that they need reach an agreement.

The Union, however, relies on two other provisions as support for its argument that the agreement restricts White

Pine's discharge authority. The first is the "Union Security and Check-off" provision:

> It is agreed that new employees shall not and do not become regular employees of the Company, unless during the first thirty (30) days of actual work following their last employment, the Company finds them to be satisfactory employees; and prior membership in the Union shall have no bearing upon the Company's privilege during the first thirty (30) days of actual work of probationary employment to terminate the service of any such employee.

The Union contends that if the Hire and Discharge provision already affords White Pine an unrestricted right to discharge, this provision is redundant. It is not superfluous, however, in that unlike in the Hire and Discharge provision, the probationary employee is not allowed to file a grievance nor is White Pine required to notify the Shop Committee of

the reason for the discharge.

The second portion of the agreement relied upon by the Union is the "seniority" provision:

> C. . . . No seniority right or privilege shall accrue to any employee who is not retained in the employ of the Company for thirty (30) days of actual work, but after such thirty (30) days of actual work, seniority shall be computed from the first day of the employee's last employment with the Company. In case of lay-off because of slackness of work, employees hired last shall be laid off first and the reverse shall apply when being put back to work, those laid off first shall be rehired last. All employees shall have the right to work in the order of their seniority provided they are competent. Any employee who is laid off shall be returned to work at his regular status when operations are resumed.
>
> . . .
>
> G. An employee shall forfeit his seniority for the following reasons:
>
> . . .

> (2) If he is discharged unless re-hired within thirty (30) days or in accordance with provisions of Article VIII, Hire and Discharge.

The Union interprets this provision to mean that when there is a slackness of work due to economic conditions, White Pine is required, no matter how dim the prospect of rehire, to lay off, rather than discharge, employees. Furthermore, the Union argues, since the agreement contains no limitation on the length of time an employee may remain on layoff status, the employee has a virtually unlimited right of recall.

In support of a mandatory layoff, the Union singles out the phrases, "In case of lay-off because of slackness of work, employees hired last shall be laid off first . . . ," and, "Any employee who is laid off shall be returned to work . . .

when operations are resumed." We believe the Union's emphasis to be misplaced. The provision is entitled "Seniority," not "Layoff," and when read as a whole merely delineates the mechanical operation of the seniority apparatus, i.e., the time at which seniority rights begin to accrue (after thirty work days), and, in the event White Pine chooses to lay off employees, the order in which the work force shall be reduced (employees hired last shall be laid off first), the order of rehire (those laid off first shall be rehired last), and the employee's position upon rehire (regular status).

Seniority rights, moreover, are expressly subject to forefeiture if the employee is discharged and not rehired within thirty days. The agreement contains no "discharge for just cause" qualification nor any limitation on White

Pine's right to make good faith economic decisions concerning the size of its work force. White Pine's good faith is not questioned. Thus, we find no basis for construing the agreement to afford employees on layoff status greater insulation from discharge than that afforded those on active duty. In this regard, we find the reasoning of the Seventh Circuit instructive:

> Seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with the right of an employer to discharge its employee.

Local Lodge 2040, International Association of Machinists, AFL-CIO v. Servel, Inc., 268 F2d 692, 698 (7th Cir.), cert. denied, 361 US 884 (1959) (citation omitted).

No Implied Covenant to Discharge for Just Cause

Generally, unless restricted by the collective bargaining agreement, an employer may discharge an employee for good cause, bad cause, or no cause at all without violating the National Labor Relations Act as long as the motivation is not to punish protected union activity. L'Eggs Products, Inc. v. National Labor Relations Board, 619 F.2d 1337, 1341 (9th Cir. 1980). The Union does not contend that these discharges were connected with union activity. Rather, it argues that the agreement contains an implied covenant that White Pine not terminate an employee except for just cause. It relies on the unpublished opinion in Local 2750 Lumber and Sawmill Workers Union v. Cole, No. 980 (D. Oregon 1978), rev'd in part, 663 F.2d 983 (1981) in which the court

implied a just cause standard. The decision in the Cole case was based upon contract language which defined "grievance" as a complaint of "disciplinary action without just cause" and which provided that "[i]f upon investigation it is found that such employee was unjustly suspended or discharged, he [would be] reinstated upon such condition as the Union and Employer agree." (Emphasis added.) We agree with the analysis of the district court that the agreement involved here is materially distinguishable from that in Cole:

> [The contract language in Cole] contemplates a finding, and it is not difficult to infer that at a hearing the employer will act in good faith in making the finding as to just cause. In this case, however, the language is "[i]n the event that an employee shall be suspended or discharged from his employment, and he believes he has been unjustly dealt with, such suspension or discharge shall remain effective . . . ." There is no requirement that the

> company and shop committee make a finding, but rather that the employee remain discharged unless the company and the shop committee shall "agree,"

Moreover, given that this agreement does not provide for arbitration, but does contain an express provision covering discharges, allotting to White Pine the "sole and exclusive right to hire, discipline and discharge any employee," indicates to us that the parties did not intend to limit the common law right of the employer to discharge at will. Had such been the intention, it could easily have been incorporated into the agreement. Cause for discharge is too important a matter to be thought to have been overlooked, and too customarily dealt with expressly, for us to assume that the parties either unconsciously left it out, or intentionally omitted it, thinking it to be implicit. It is not for this court

to substitute its judgment for that of White Pine as long as White Pine exercised its prerogatives in good faith and in accordance with its contractual obligations. To do otherwise would be to subvert the collective bargaining process by remaking the collective bargaining agreement. Accordingly, the district court is

AFFIRMED.

FLETCHER, Circuit Judge, dissenting:

[June 12, 1984]

I respectfully dissent. The majority holds that White Pine may discharge any or all of its laid-off employees at any time, without regard to seniority. Its interpretation of the collective bargaining agreement ignores the contract's declaration that "[a]ll employees shall have

the right to work in the order of their seniority provided they are competent. Any employee who is laid off shall be returned to work at his regular status when operations are resumed." By discharging laid-off workers, White Pine could destroy arbitrarily the workers' contractual right to be rehired in order of seniority. It could also rehire these same employees in the future without the other benefits of seniority for which they bargained, such as the right to be laid off in order of seniority and the right of a senior employee to "bump" a less senior employee in another department if there were a cutback in the more senior employee's department. The majority's interpretation eliminates significant rights upon which the parties have agreed.

The Supreme Court has recognized that "in common parlance and in industrial

parlance" a discharge is quite different from a layoff, which occurs "when the slackening of work require(s) a reduction in forces." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 286-87 (1946). The only sensible interpretation of the contract which gives all of its terms meaning is one which recognizes the distinctive treatment the agreement and the contracting parties give to each of these situations. Provisions relating to "discharge," including Article VIII, which gives the employer the exclusive right to hire and discharge employees, and Article XIV, section G(2), which provides that an employee who is discharged forfeits seniority, refer only to the discharge of an employee who is actively working for the employer. The employer's right to discharge in this situation does not unreasonably conflict with seniority

rights because it can be assumed that the employer will not arbitrarily terminate the competent workers it needs to keep its business going. Further, grievance procedures are provided for any such discharged employee who feels himself unjustly dealt with. The same assumption does not apply to the termination of laid-off employees for whom the employer has no immediate need, as the employer's conduct in this case demonstrates. The contract is specific that laid-off employees have an absolute right to be rehired in order of seniority, subject only to the express limitation that they be competent. Because the employer has violated the collective bargaining agreement by discharging laid-off employees, I would reverse.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCAL UNION NO. 2812, LUMBER PRODUCTION AND INDUSTRIAL WORKERS,

Petitioner/Appellant,

v.

MISSOULA WHITE PINE SASH COMPANY, a Montana corporation,

Respondent/Appellee.

No. 83-3776

D.C. No. CV 82-0016 MONTANA (Missoula)

O R D E R

[November 9, 1984]

Before: ANDERSON, FLETCHER, AND FARRIS, Circuit Judges.

Judges Anderson and Farris have voted to deny the petition for rehearing and to reject the en banc suggestion. Judge Fletcher would grant panel rehearing and the en banc suggestion.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote

on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

LOCAL UNION NO. 2812, LUMBER, PRODUCTION AND INDUSTRIAL WORKERS,

Plaintiff, CV 82-16-M

v.

MISSOULA WHITE PINE SASH CO., OPINION

Defendant.

[April 11, 1983]

This case, involving the interpretation of a collective bargaining agreement, is submitted on an agreed statement of facts.

Missoula White Pine Sash Co. (White Pine) is a wood-working plant in Missoula and is a party to a collective bargaining agreement with Local Union No. 2812, Lumber, Production and Industrial Workers (Union). Because of a diminished demand for lumber products the work force

in June 1982 was 194 while in June 1981 it had been 234. For the same reason 94 men were on a layoff status in June 1981 and 135 on a layoff status in June 1982. On June 30, 1981, White Pine terminated the employment of fourteen of its most junior employees, all of whom were then on a layoff status for the stated reason: "[W]e can see no reasonable expectations of being able to recall all our employees who are currently laid off due to the depressed economy."

The collective bargaining agreement contains a seniority clause which provides in Article XIV(C) that after thirty days' employment an employee gains seniority status and then:

> In case of lay-off because of slackness of work, employees hired last shall be laid off first and the reverse shall apply when being put back to work, those laid off first

> shall be rehired last. All employees shall have the right to work in the order of their seniority provided they are competent. Any employee who is laid off shall be returned to work at his regular status when operations are resumed.

It is the Union contention that since the period of layoff is not limited it extends indefinitely and that the employer has no right to discharge an employee in a layoff situation, and thus terminate his seniority, simply because the conditions giving rise to the layoff may continue for an extended period of time.

The agreement provides:

> ARTICLE VIII
> HIRE AND DISCHARGE
>
> The Company shall have the sole and exclusive right to hire, discipline and discharge any employee. In the event that an employee shall be suspended or discharged from his employment, and he believes he has been unjustly dealt with, such suspension or discharge shall remain effective, but shall constitute a case

> to be handled under methods of adjusting grievances under Article V, Handling Complaints. Such grievances shall be taken up with the Company within three (3) working days from the date the employee is informed of a suspension or discharge, or shall be considered waived. If, upon investigation and consideration, the Shop Committee and Company agree that an employee was unjustly discharged and should be reinstated, such reinstatement shall be in accordance with the terms of settlement arrived at between the Company and Shop Committee. In case an employee is discharged, the Company agrees to notify the employee and the Shop Committee immediately, giving reason(s) for discharge.

This provision literally read gives White Pine the right to discharge without cause since if White Pine does not agree that the employee was "unjustly dealt with" the employee is not reinstated.

White Pine contends that under Article VIII it has the right to discharge and under Article XIV(G)(2) it has a right to terminate seniority. Article XIV(G)(2)

reads in part: "An employee shall forfeit his seniority for the following reason(s): . . . (2) If he is discharged unless rehired within thirty (30) days or in accordance with provisions of Article VIII, Hire and Discharge." If Article XIV(G)(2) is read literally, then when the fourteen employees were discharged and were not rehired within thirty days and did not return to work in accordance with the provisions of Article VIII, they automatically lost seniority.

However, the Union position is that there should be read into the contract an implied covenant that White Pine would not terminate except for just cause. The Union relies upon the Rosboro Lumber case (Local 2750 Lumber Workers' Union v. Cole, Civil No. 980 (D.C. Ore., filed Feb. 23, 1978)). That case, insofar as

is pertinent here, involved a disciplinary problem. In Rosboro, the contract language was that a "grievance" includes a complaint of "disciplinary action without just cause" and "[i]f upon investigation it is found that such employee was unjustly suspended or discharged, he [would be] reinstated upon such conditions as the Union and Employer agree." (Emphasis deleted; emphasis supplied.) This language contemplates a finding, and it is not difficult to infer that at a hearing the employer will act in good faith in making the finding as to just cause. In this case, however, the language is "[i]n the event that an employee shall be suspended or discharged from his employment, and he believes he has been unjustly dealt with, such suspension or discharge shall remain effective ...."

There is no requirement that the company and shop committee make a finding, but rather that the employee remain discharged unless the company and the shop committee shall "agree."

Perhaps where a contract contains an implied condition that an employer will make a fair finding, and the employer makes an unfair finding, the court may make the finding, but where a contract calls for the agreement of the employer, may the court make the agreement? If 29 U.S.C., § 158(d) was intended to apply to disputes arising after a collective bargaining agreement has been reached, then the most that can be said of it is that the employer is required to confer in good faith; it does not require either party "to agree to a proposal or require the making of a concession."

Another consideration leads me to think that the collective bargaining agreement does not impose upon the court in this case the duty of deciding whether the employees were "justly dealt with." The decision to terminate the employees was not disciplinary, and whether it made any sense from a business standpoint to eliminate people from the working force rather than to continue them on stand-by, the decision was a business decision. I do not think that it can be said that in this contract, which carefully protected the employer's rights to hire and fire, there is any room for an implied term giving the court the power to interfere with plaintiff's [sic] business judgment.

Hence I conclude that White Pine had a right of discharge under Article VIII and that seniority could be terminated

under Article XIV(G)(2).

Judgment shall be entered denying the plaintiff all relief.

DATED this 11th day of April 1983.

/s/

Russell E. Smith
United States District Judge

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA,
MISSOULA DIVISION

LOCAL UNION NO. 2812, LUMBER PRODUCTION AND INDUSTRIAL WORKERS

vs.

Civil Action Docket No. 82-16-M

MISSOULA WHITE PINE SASH CO.

JUDGMENT

[April 11, 1983]

This action came on for trial before the court, United States District Judge Hon. Russell E. Smith presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that plaintiff is denied all relief and may take nothing by this action and that defendant recover its costs of action.

Dated at Missoula, Montana
Date: April 11, 1983.

Lou Aleksich, Jr., Clerk
By: Deputy Clerk of the Court